Nos. 97-1695, 97-1704

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

—v.—

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding with the following exceptions. William James Mitchell is a plaintiff class representative not listed in the petition; and James and Juanita Drake are not class representatives (and, to respondents' knowledge, are not parties).

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly-owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly-owned subsidiaries of respondent Pacific Indemnity Company.

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STATEMENT OF THE CASE

In an attempt to deflect attention from the true nature of this petition — a scattershot array of factbound objections to a *sui generis* case — petitioners have presented the class action settlement in this case (known as the "Global Settlement") and the Fifth Circuit decisions approving it in a totally misleading fashion. They portray the Global Settlement as a carbon copy of the settlement invalidated by this Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), where the district court had approved a class settlement solely on the basis of projected increased efficiency over individual adjudications in the tort system. But as both lower courts expressly found — in findings petitioners wholly ignore — the basis of the Global Settlement here is decidedly different: a unitary class settlement was necessary in this case *in order to secure the class's only possible source of meaningful recovery.* App. 73a-74a, 231a-232a, 241a.

As the Fifth Circuit put it, the Global Settlement was "undisputedly driven" by a mammoth coverage dispute between Fibreboard Corporation and its two insurers (App. 75a) — a coverage dispute that receives scant mention in the petition's description of the case. On August 27, 1993, when the Global Settlement was reached in principle, the parties were confronted with the following circumstances. The class, comprised of over 100,000 future asbestos claimants, had potentially well over $1 billion in claims against Fibreboard. Fibreboard, however, also faced more than $1 billion in *current* settlement obligations, and had non-insurance assets sufficient to pay no more than a small fraction of that amount. App. 42a, 277a. Instead, the source of *any* meaningful recovery for class members lay in two insurance policies that Fibreboard had purchased from respondents Continental and Pacific. Although Fibreboard claimed that these policies provided it with no-aggregate-limit coverage, the two insurers were disputing coverage in a California litigation that, as both lower courts found, Fibreboard had a "significant risk" of losing outright. App. 52a, 75a-77a, 357a. The morning of the agreement in principle, the California Court of Appeal had heard the final argument in that litigation and announced its intention to rule expeditiously.

For class members, then, a settlement of the coverage dispute was the *only* possible alternative to catastrophic risk: a Fibre-

Board loss in the coverage litigation would render their claims against Fibreboard, no matter how meritorious, virtually worthless, for Fibreboard would then be left "insolvent simply on the basis of claims already settled." App. 75a, 357a-358a. But as detailed below, a settlement of the coverage dispute was possible only as part of a unitary resolution involving the class. The District Court found (and the Fifth Circuit confirmed) that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 374a-375a, 75a-77a; *see* pp. 5-7, *infra*.

There is thus no basis whatever for petitioners' overblown cries that the Fifth Circuit's approval of the Global Settlement here was "insubordination" and an "astonishing refusal to apply the rules of law laid down by this Court" in *Amchem* (Pet. 15, 30) — much less any basis for their insistence that this Court must assume the factbound role of correcting an alleged misapplication of *Amchem* less than 12 months after that case was decided and despite the lack of any conflict among the lower courts as to its meaning. To the contrary, this case presents *precisely* what this Court found lacking in *Amchem*: a compelling reason, "commonly held" by all class members, why a class settlement was necessary. App. 57a-58a & n.8. All class members shared the "real and enormous" risk of "the catastrophic results of a loss by Fibreboard in the coverage case," and, consequently, an overriding common stake in an action and a settlement that would fairly resolve that risk. App. 76a, 69a, 58a & nn.7-8. By the same token, "[n]one of the uncommon questions, abounding in *Amchem*, exist in th[is] case": contrary to petitioners' repeated insinuations, the Global Settlement — while resolving the commonly held issues "regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation" where there may not be enough money to go around — did *not* liquidate the recoveries of individual class members. App. 3a, 57a-58a & n.8, 85a.

Review is similarly not warranted of petitioners' subsidiary complaints about the non-opt-out nature of this class. In particular, this case does not present the question raised in *Adams*

v. Robertson, 117 S. Ct. 1028 (1997), whether opt-out rights may be denied as to claims for money damages simply because a proposed settlement would provide equitable remedies that would be more efficient than individual suits for damages. To the contrary the plain language of Rule 23(b)(1)(B) and hundreds of years of precedent make clear that a non-opt-out class is called for in cases involving monetary claims where, as here, a unitary resolution is necessary to protect the class. *See* pp. 18-27, *infra*. Petitioners' hodgepodge of objections to the Fifth Circuit's application of this settled law (objections for which they cite virtually no authority at all, much less a valid conflict) present no reason for this Court's review.

Instead, this case presents unique circumstances in which class members needed a unitary resolution in order to resolve a common overwhelming risk; in which no one disputes that the plain language of Rule 23(b)(1)(B) authorized a non-opt-out class; in which an indisputably fair unitary resolution was reached and was approved, after exhaustive inquiries, by the courts below; and in which the appropriateness of such a resolution was established by centuries of jurisprudence. As petitioners' own counsel has previously acknowledged — in a statement completely contrary to the petition's extravagant claim that the Fifth Circuit has "issued an invitation to mass tort defendants nationwide" to flock to "the courts of that circuit" (Pet. 2) — the decision below does not "offer significant precedent for future . . . class actions" because "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again. [The panel's decision is] only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't occur very often." *Business Insurance*, August 5, 1996, at 38.

I. Background and Procedural History

The Global Settlement, reached on the very eve of the potentially final appellate argument in the coverage litigation after extended, hard-fought negotiations, resolves the risks that litigation posed to the class, to Fibreboard and to the insurers. It does so on financial terms that not even petitioners claim are unfair to the class: payment of over $1.5 billion to be placed in

an asset-conserving, independent Trust for the benefit of "future" claimants in return for their releasing Fibreboard and the insurers from personal injury asbestos claims. App. 49a-50a. And it accomplishes this in a manner that maximizes the amount of money class members will actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. App. 362a-366a. Equally important, however, is what the Global Settlement does *not* do: it does *not* liquidate a single personal-injury tort claim for money damages, and it does *not* deprive class members of their right to control their individual claims. App. 58a & nn.7-8, 85a. Instead, those claims will be liquidated on an individual basis as they arise. App. 50a, 346a.

So the District Court found in comprehensive findings of fact, conclusions of law and an extensive opinion issued after an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners — a hearing which itself followed broad discovery by petitioners and an unprecedented $18 million worldwide notice campaign. The District Court found, as noted above, that the risks posed to all parties by the coverage dispute could be resolved "only" through a unitary settlement encompassing all claims, and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution permitting equitable distribution." App. 241a, 231a-232a. It went on to find that the Global Settlement is fair to the class, and — given the risks posed by the coverage dispute — indeed represents a "far" superior outcome for the class than any practical alternative. App. 241a-242a, 366a-367a.

The Fifth Circuit affirmed these findings, conclusions and opinion, with one judge dissenting. In an extensive opinion, the court considered and rejected at length each one of the myriad of objections petitioners had raised, including their claim that the District Court's judgment was at odds with the Third Circuit's decision in *Amchem* (then named *Georgine*). Recounting in detail the "stark contrast" between this case and *Amchem*, the Fifth Circuit — correctly anticipating this Court's *Amchem* hold-

ing — held that the class here was valid despite its "like[ly] agreement" that the *Amchem* class was not. App. 57a-58a & n.8.

This Court subsequently remanded this case to the Fifth Circuit for further consideration in light of *Amchem*. The Fifth Circuit ordered briefing on the issue, and heard full oral argument. It then reaffirmed its conclusion regarding the "controlling differences between this case and *Amchem*," with one judge dissenting. App. 2a. Respondents respectfully refer this Court to the District Court's findings and to the Fifth Circuit majority opinions for a full description of the Global Settlement and the circumstances and negotiations that led to it.

II. The Uncontested Record

Petitioners, however, completely ignore the findings of the courts below. They proceed as if the class somehow had no need to participate in a settlement here; as if the coverage dispute were an irrelevant sideshow; and as if the Global Settlement actually liquidated the individual recoveries of hundreds of thousands of individual tort claimants in the name of "tort reform by judicial fiat." Pet. 2. In short, they pretend that this case is *Amchem* itself. This self-serving presentation — which is obviously intended to obscure the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage dispute — was roundly rejected by both courts below in findings that petitioners pretend do not exist, but nowhere seriously dispute.

A. The Risk Posed To The Class By The Coverage Dispute Required A Unitary Resolution.

For all their rhetoric, petitioners never take issue with the findings of the courts below that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 75a-76a. Indeed, Fibreboard and one insurer had earlier tried to settle the coverage dispute *without* the participation of the plaintiffs, and had failed. App. 314a. As the lower courts determined, the unique circumstances of this coverage dispute — involving a claim of no-aggregate-limit, billion-dollar-plus coverage on which the insured's corporate survival was entirely dependent — did not permit a piecemeal settlement. App. 231a-232a, 241a.

To the contrary, from *Fibreboard's* perspective, its coverage claims were the only thing that stood between it and insolvency: it believed it could remain a viable company, solve its asbestos problem and preserve its net worth if it prevailed in the coverage litigation; it would be immediately bankrupt if it lost. App. 357a-358a. Accordingly, it was not about to settle that litigation on terms that would still leave it facing inevitable bankruptcy. Unless it were to receive from the insurers a sum of money sufficient to ensure that it would be in a position to pay all asbestos claims and all costs of defense in an ongoing litigation regime, it was not willing to leave itself naked of insurance and yet exposed to further claims by asbestos plaintiffs. App. 309a, 374a-375a. Thus, from Fibreboard's standpoint, any settlement of that dispute either had to (1) be so financially cushioned that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy; or (2) involve the asbestos plaintiffs.

The *insurers*, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential open-ended, no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which, as the District Court and Fifth Circuit found, they had a significant chance of escaping any liability at all (App. 52a, 75a-76a, 357a) — by giving Fibreboard the "cushion" necessary to place its survival beyond question in the face of continuing asbestos claims and defense costs. App. 330a. Nor were they willing to pay the enormous sums entailed by a settlement without ensuring that they had ended their exposure once and for all. The Fifth Circuit fully compiled the reasons why the insurers could not afford to remain exposed to opt-outs, not the least of which was that the timing of the coverage appeal would have entailed giving class members the right to opt-out *after* the outcome of the appeal was known, and hence a one-way option on the coverage litigation. App. 43a-44a, 306a-307a, 374a. Thus, from the insurers' standpoint, any settlement of the coverage dispute involving sums acceptable to Fibreboard had to involve all the asbestos plaintiffs.

The situation facing the *class* was thus simple. The insurers and Fibreboard could not come to terms on a settlement of the

coverage dispute without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage dispute continued. Those parties were consequently offering the class a tremendous amount of money as part of a global settlement of their claims — an amount that, while not guaranteeing all class members a 100% recovery, was indisputably a fair resolution of their claims. App. 98a, 359a-361a. The class could either secure that enormous fund for itself, or run the significant risk of losing the insurance entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets.

In light of this, petitioners' portrayal of the Global Settlement as an unnecessary expedient designed to let big business off the hook is grossly inaccurate. When the actual nature of the circumstances that gave rise to the Global Settlement are considered, the true import of petitioners' arguments becomes clear: as they would have it, class members — as a matter of their *own* due process rights, no less — had no alternative but to continue to suffer the risks of the coverage litigation.

B. The Fundamental Differences Between This Case And *Amchem*.

This overriding common stake of class members in a unitary resolution renders this case fundamentally different from *Amchem*. As the Fifth Circuit determined, petitioners' portrayal of this case as a carbon copy of *Amchem* is simply unfounded.

1. *Amchem* involved a settlement resolving the claims of "hundreds of thousands, perhaps millions of individuals" having in common nothing beyond "past exposure to asbestos products manufactured by one or more of 20 companies." *Amchem*, 117 S. Ct. at 2237. No reason was offered why these persons had any need for a class resolution of their claims: in particular, no contention was made that class members would lack an adequate source of recovery if permitted to continue to proceed with individual actions. *See id.* at 2249 n.19. Instead, certification was sought under Rule 23(b)(3) not on the basis of class members' needs, but rather (as in Rule 23(b)(3) class

actions generally) simply upon claims of increased "systemic efficiency" over individual adjudications. *Id.* at 2246.

This notwithstanding, the settlement did "'more than simply provide a general recovery fund'" for class members' benefit; it instead made "essential allocation decisions designed to confine compensation and to limit the defendants' liability," decisions that "necessarily favor[ed] some claimants over others." *Id.* at 2243, 2251. For example, the *Amchem* settlement apportioned "individual damages" by specifying a narrow range of damages payable for each disease type. App. 58a & n.8; *see* 117 S. Ct. at 2240. It prohibited inflation adjustment of these ranges, and imposed "case flow maximums" capping the number of claims payable for each disease in a given year. 117 S. Ct. at 2240. And it extinguished without any compensation at all a wide variety of claims, even if they were otherwise recognized under applicable state law. *Id.*

Finally, "[c]lass members, in the main, [were] bound by th[is] settlement in perpetuity, while [the] defendants [could] choose to withdraw from the settlement after ten years." *Id.* at 2241. A "back-end" opt-out right, whereby a class member could exit the settlement and sue in the tort system upon the subsequent manifestation of injury, was limited to a "small number of class members — only a few per year." *Id.* Perhaps unsurprisingly, this settlement came under sharp attack by numerous objectors as financially unfair to the class. *Id.*

The *Amchem* settlement, in sum, took a class of persons with virtually no common interests and no common need for a class resolution, and imposed upon them a class-wide resolution of a host of matters on which their interests sharply diverged.

2. The Global Settlement in this case is different on every level. App. 2a-3a, 57a-58a & nn.7-8. Class members here shared — not simply past exposure to asbestos products — but also the "real and enormous" risk arising from the coverage dispute. App. 76a. *All* class members "faced the real possibility" that an adverse decision in that dispute would leave them no source of recovery whatever. App. 75a. *All* class members thus shared an "identical" need for a class resolution "to avoid the

risks of insurance coverage litigation and to insure that money remains available to pay their claims." App. 3a, 57a-58a.

As the Fifth Circuit found, the class resolution in this case was thus "undisputedly driven" — not, as in *Amchem*, by a search for alternatives to the tort system — but by this common and overriding need of the class. App. 75a, 57a-58a. Class certification was accordingly predicated not on Rule 23(b)(3), but on the very different provisions of Rule 23(b)(1)(B), which provides for class treatment where class members' pursuit of individual actions would create a risk of prejudice to other class members' claims. App. 2a, 72a-85a.

Moreover, as the Fifth Circuit put it, while the Global Settlement resolves the risk to class members by providing an enormous and unquestionably fair amount of "money and an equitable distribution process," it does *not* "award damages to individual victims" or "make any determination" of the "amount" of money to which they are entitled. App. 57a-58a, 85a, 50a. Unlike in *Amchem*, it sets *no* ranges of recoveries for particular diseases and makes "no allocation or difference in award according to nature or severity of injury"; individual recoveries will instead be "subsequently" liquidated on an "individual" basis as they arise through *non*-binding negotiations, mediation or arbitration with an independent Trust, which will consider all historically relevant individual factors and circumstances. App. 2a, 49a-50a, 57a-58a & n.7, 337a, 346a. And if individual claimants are dissatisfied with their proposed recovery for any reason, they have an absolute "back-end" right to litigate their claims in court, with the Trust substituting for Fibreboard as the defendant. App. 50a, 58a n.7, 346a; *see* pp. 12-13, *infra*. *No* objector, petitioners included, challenged this settlement as financially unfair.

As the Fifth Circuit put it, the Global Settlement, in marked contrast to *Amchem*: involved a class sharing an overriding common interest "regarding insurance coverage for the class's injuries and establishment of an equitable distribution process to insure that all class members receive compensation"; resolved *only* those "commonly held questions"; and did *not* resolve the matters — what each class member will actually

recover — as to which class members' interests may differ. App. 57a-58a & n.8; *see also* App. 2a-3a.

C. The Trilateral Agreement Is Markedly Inferior To The Global Settlement.

These findings of the courts below notwithstanding, the coverage dispute goes practically unmentioned in the petition. Indeed, petitioners' primary reference to it is a brief allusion to its having been supposedly "mooted" by the "Trilateral Agreement" between Fibreboard and the insurers. Pet. 2-3 n.2. They assert that the Trilateral Agreement "provides that, if the Global Settlement is *not* approved, the insurers will pay Fibreboard $2 billion — half a billion *more* than the insurers' payment to the trust under the Global Settlement" and that it "guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims." Pet. 4.

These assertions range from the materially incomplete to the flatly untrue. Under the Trilateral Agreement, Fibreboard would indeed receive $2 billion from the insurers if the Global Settlement were not approved — but it would have to use that money to pay a host of claims and other liabilities *in addition* to those advanced by class members, including unsettled asbestos claims of "present" claimants not within the class and the enormous defense expenditures entailed by resolving claims in litigation. App. 361a-362a, 354a-355a. As a result, the record and findings below are uncontroverted that — contrary to the statements in the petition — the Trilateral Agreement is "far" inferior to the Global Settlement from the point of view of the class and does *not* provide enough money to guarantee payment, full or partial, to class members. App. 73a, 358a-359a, 361a-366a. The record is uncontested that the class would in the aggregate receive at least several hundred million dollars *less* under the Trilateral Agreement than under the Global Settlement, and a significant number of class members might well receive *nothing* at all. App. 358a-359a, 361a-362a.*

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* The expert testimony at the fairness hearing laid this out in detail. That testimony was that the class would receive $234-477 million *less* under the Trilateral Agreement than under the Global Settlement, even taking Fibreboard's equity into account. App. 327a-328a; JA7:2054-

Indeed, as the Fifth Circuit summarized the record, under the Trilateral Agreement, "Fibreboard would be unable to pay all the valid claims against it within five to nine years." App. 73a.

The reason for this lies in the origins of the Trilateral Agreement, which is likewise omitted from the petition. The Trilateral Agreement grew out of a last-minute demand by class counsel that, as a condition to the class's entry into the Global Settlement, Fibreboard also as a "back up" settle the insurance dispute directly with the insurers so that — even if the Global Settlement were not approved — the coverage dispute would not proceed. App. 329a-330a. The insurers, however, insisted that such a "back up" agreement cost them no more than $2 billion, notwithstanding Fibreboard's insistence that it needed hundreds of millions of dollars more to pay for the other liabilities described above and the defense costs it would incur in the tort system. App. 329a-330a. The record is clear that Fibreboard yielded only as the price for obtaining agreement to the Global Settlement. App. 314a. It is thus perverse for petitioners to stand the settlement on its head by maintaining that this contingent, inferior "back up" agreement nullifies the class's need for the "far" superior Global Settlement. App. 366a.

D. Bankruptcy Was Not An Available Option.

Although petitioners suggest that bankruptcy would have provided an alternative to a unitary class resolution — and criticize the Fifth Circuit for having "an avowed purpose of circumventing the Bankruptcy Code" (Pet. 11, 21) — they do not quarrel with one central fact: class members could not have put Fibreboard into bankruptcy in August 1993. App. 78a, 376a. Bankruptcy proceedings could have been reached only by forcing Fibreboard to litigate for and *lose* its claimed insurance, the only source of real recovery for the class. App. 76a-79a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn a $1.535 billion settlement and force Fibre-

56, 2768-70; JA125. As a consequence — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (App. 359a) — under the Trilateral Agreement 41-50% of the class, between 104,000 and 127,000 asbestos claimants, would likely be left unpaid. JA117; JA118.

board to roll the dice in the coverage litigation: secure in the knowledge that, though coverage might be lost, a bankruptcy proceeding in which class members would receive at most pennies on the dollar would be waiting to "protect" them.

E. The Petition Completely Misrepresents The District Court's Role.

The dramatic license petitioners have taken with the facts of this case is no more evident than in their constant refrains that the District Court "choreographed," "orchestrated" and "coached" the Global Settlement. Pet. 2-3, 26. As the Fifth Circuit found in rejecting petitioners' similar insinuations below, "Judge Parker's role in the negotiating process was insubstantial." App. 89a; *see* App. 46a. The Fifth Circuit's description of the origins of this case is likewise categorically at odds with petitioners' charge that the District Court injected itself into the parties' dispute "before a lawsuit was even filed." Pet. 3. As the Fifth Circuit related, before taking a single action with respect to the negotiations that led to the Global Settlement, the District Court had before it a case: (a) asserting the rights of tens of thousands of asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure the defendant Continental into seeking an overall resolution of the coverage dispute; and (c) where Continental had informed the court that it would be willing to settle only as part of such an overall resolution. App. 42a-43a. And even then, the District Court did not itself participate in negotiations, but rather appointed a separate mediator (Judge Patrick Higginbotham of the Fifth Circuit) to assist the parties. *Id.*

F. The Global Settlement Is Financially Fair.

Finally, despite their vitriol about the alleged sacrifice of the class's rights, petitioners do *not* assert that the Global Settlement is financially unfair to the class. Nor could they. The settlement transforms disputed insurance coverage into over $1.5 billion cash for distribution to class members in accordance with procedures that ensure that the proceeds will not be dissipated on Fibreboard's costs of defense or plaintiffs' transaction costs (including contingency fees).

These overwhelming benefits, as the District Court and Fifth Circuit found, far outweigh the few minor ways in which the settlement might affect the amount of damages some claimants might receive for their claims. App. 372a-374a, 85a. Indeed, these effects are caused principally by provisions designed to *protect* the interests of class members — by avoiding inequitable dissipation of the trust funds through disproportionate windfall awards, *e.g.*, punitive damages against the *Trust* — and should have only minimal impact on class members' individual recoveries.* Moreover, this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. The important questions are thus whether the $1.535 billion the class was able to extract is fair and reasonable in light of the risks posed by the coverage dispute, and whether receipt of that fund and resolution of those risks warrants the limitations discussed above. Petitioners do not contest the lower courts' affirmative findings on either point.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ALLEGATIONS THAT THE FIFTH CIRCUIT "DEFIE[D]" *AMCHEM* ARE BASELESS.

Petitioners' primary contention is that this Court — less than one year after deciding *Amchem*, and in the absence even of any allegation of conflict or confusion in the lower courts as to its meaning — should take the extraordinary step of reviewing the factbound question whether the Fifth Circuit correctly applied that decision on the facts of this case. Petitioners base

* While petitioners complain about several of the "limitations" imposed by the Global Settlement (such as the $500,000 cap on damages, Pet. 6), the District Court found on the uncontroverted record that these provisions reflect tort-system realities in suits against Fibreboard. For example, the District Court specifically found that only a handful of the over 100,000 plaintiffs to have sued Fibreboard before the Global Settlement was reached had ever recovered more than $500,000 in damages against it and that the insurance policies at issue in the coverage dispute specified a $500,000 per-person limit. App. 373a. The District Court made similar express findings regarding the minimal effect of the other alleged limitations on recovery. App. 372a-374a.

this contention on wild and reckless charges of supposed "astonishing" "insubordination" by the Fifth Circuit.* These charges are baseless and do not warrant this Court's review.

1. To begin with, this Court's opinion in *Amchem* did not, as petitioners assert, "*already* reject[ ] the Fifth Circuit's application of Rule 23(a) to this settlement class action." Pet. 11 (emphasis in original). One searches *Amchem* in vain for petitioners' claimed directive that this very different class settlement must necessarily be disapproved. To the contrary:

- *Amchem* distinguished this case by name as involving a less "sprawling" settlement class, 117 S. Ct. at 2250;
- *Amchem* went on repeatedly to emphasize that it did *not* involve a Rule 23(b)(1)(B) class settlement, that its ruling was rooted in large part in peculiar concerns arising out of class certification under the very different provisions of Rule 23(b)*(3)*, and that the governing requirements would be different in cases under Rule 23(b)(1)(B). *See id.* at 2245-47, 2249 n.19.
- *Amchem* then observed that its primary ground for decision — lack of "predominance" of common issues — does *not* apply to cases "under Rule 23(b)(1)(B)." *Id.* at 2249 & n.19. And it also indicated that the intraclass conflict in that case existed precisely because the settlement purported to make "essential allocation decisions" regarding individual claimants' compensation even though it was "not a 'limited fund' case certified under Rule 23(b)(1)(B)." *Id.* at 2251.

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* Seeking to divert attention from the lack of any conflict among the lower courts as to *Amchem*'s meaning, petitioners also contend that this Court should nonetheless grant review because "this case enshrines the Fifth Circuit as venue of choice for mass tort defendants" and "other courts of appeals" will supposedly not "have an opportunity to rule" on this issue. Pet. 30. The empirical basis for this dire prediction is unclear at best. Petitioners have incanted this augury ever since this case was filed in 1993, yet are unable to cite a single similar class action settlement in any court of the Fifth Circuit in the intervening five years.

In short, *Amchem* — far from "expressly repudiat[ing]" and "reject[ing] the Fifth Circuit's" decision (Pet. 11-12) — left undisturbed that Circuit's previous conclusion that this case meets the requirements of subdivision (b)(1)(B) of Rule 23, and then distinguished Rule 23(b)(1)(B) cases from each of this Court's grounds for rejecting the *Amchem* settlement.

Indeed, petitioners suggest that the Fifth Circuit defied a direct command of this Court in *Amchem* only by unfairly tinkering with a quote from the Circuit's first (*pre-Amchem*) opinion. They attribute to the Fifth Circuit the statement that "in the settlement class context, common issues arise from the settlement itself," and present the Fifth Circuit as therefore having held that "settlement obviates or reduces the need" for scrutiny of class certification. Pet. 11-12. They then proclaim that *Amchem* rejected this supposed "holding" of the Fifth Circuit.

Inspection reveals, however, that the phrase attributed to the Fifth Circuit appears only as a parenthetical description of the view of the Newberg treatise, *not* as the Fifth Circuit's holding. App. 56a. What the Fifth Circuit did hold was that courts must "consider the settlement" and "look at the terms of a settlement" in assessing certification of a settlement class (App. 54a-56a): not, as petitioners allege, in order to pretermit the certification inquiry, but to *assist* that inquiry by allowing consideration of "important and relevant information" that "will often expose diverging interests or common issues" not otherwise evident. App. 54a-55a.* This *actual* holding is squarely in accord with *Amchem*'s recognition that a "settlement *is* relevant to a class certification," "*is* a factor in the calculus" and *cannot* be "ignore[d]" in the certification inquiry — as well as with the thorough consideration of the settlement undertaken in *Amchem* itself. 117 S. Ct. at 2248-49, 2251 (emphasis added).

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* Indeed, this holding that settlement may "expose diverging interests" — and thus may count *against* certification — belies petitioners' charge that the Fifth Circuit held that the existence of a settlement "obviates or reduces" the certification inquiry. Petitioners' charge is also at odds with the Fifth Circuit's statement that it "likely agree[d]" with the Third Circuit that — the existence of a settlement notwithstanding — the *Amchem* class (which was not yet before this Court) could not be certified because of "typicality and commonality problems." App. 58a n.8.

2. Similarly, petitioners' cries of "insubordination" find no support in the fact that the Fifth Circuit reaffirmed its prior judgment after this Court remanded this case "for further consideration in light of *Amchem*." App. 36a. Beginning with its impertinent first sentence, the petition depicts a GVR order as really being a directive for reversal rather than (as the order states) "for further consideration," and implies that certiorari is to be granted as a matter of course if a court of appeals determines upon "further consideration" that its original judgment is not affected by this Court's intervening decision. Pet. 1-2. That is simply not the case: indeed, in the past two years alone, this Court has denied certiorari at least 7 times where a court of appeals reaffirmed its original judgment after a GVR.*

Nor do petitioners' sneers about the length of the Fifth Circuit's opinion on remand — as if brevity were somehow a reversible vice — aid their cause. As noted above, the Fifth Circuit in its prior opinion had *already* detailed the distinctions between this case and *Amchem* and noted its "likely *agree-[ment]*" with the Third Circuit's disapproval of the *Amchem* settlement. *See* pp. 4-5, 7-10, *supra*. Indeed, the Fifth Circuit had there indicated its view that the *Amchem* class did not satisfy Rule 23 for the precise reason ultimately adopted by this Court: because that action — unlike this one — did nothing beyond "requesting individual damages for members of a global class of asbestos claimants" despite "the huge number of individuals and their varying medical expenses, smoking histories, and family situations." App. 57a-58a & nn.7-8; *compare Amchem*, 117 S. Ct. at 2250. It hardly amounts to "insubordination" for the Fifth Circuit (after full briefing and argument) to have restated this conclusion, in which it had cor-

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* *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *United States v. Meza*, 127 F.3d 545 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1103 (1998); *Motorcity v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3704 (1998); *United States v. Knapp*, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997); *Martin v. Telectronics*, 105 F.3d 1090 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 850 (1998); *McLeod v. Oregon*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir.), *cert. denied*, 117 S. Ct. 1849 (1997).

rectly anticipated this Court's *Amchem* ruling, by cross-referencing the findings "detailed in [its] prior opinion" (App. 2a-3a) rather than by recapitulating them in full.

3. Once the petition is stripped of these baseless assertions of "insubordination," it loses even any pretense of presenting a certworthy issue. Petitioners' remaining assertions that insufficient common issues and an intraclass conflict existed on the particular facts of this case raise no question warranting review.

First, there is no merit to petitioners' argument that, because common questions did not "*predominate*" under Rule 23(*b*)(3) in *Amchem*, such questions do not *exist* under Rule 23(*a*)(2)-(3) in this case.* To the contrary, *Amchem* addressed the "far more demanding" predominance requirement on the assumption that the less-demanding Rule 23(a) "commonality requirement may be satisfied by [the] shared experience" of class members in being "exposed to asbestos products supplied by defendants." 117 S. Ct. at 2250. Accordingly, the commonality and typicality threshold is *a fortiori* satisfied here, where class members share not only that "experience," but also the central claims in this case — that they are entitled to the insurance proceeds subject to the coverage dispute. App. 3a.

Second, this case does not present the intraclass conflict identified in *Amchem* between currently injured and "exposure-only" class members. Rather than creating internal conflicts, the Global Settlement's principal provisions — securing over $1.5 billion of disputed insurance coverage to compensate the class — greatly benefit *all* class members, currently injured and exposure-only alike, since they *all* would otherwise have faced the "real and enormous" risk that a Fibreboard loss in the coverage litigation would have left each of them without any meaningful compensation at all. App. 76a, 58a. As the courts below found, this "common interest" of class members in the Global Settlement "vastly overwhelmed" and "far outweighed any divergent interest the intraclass groups may have," and "during the process of negotiations there was no competition

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* As noted above, the "predominance" requirement does not apply to this 23(b)(1)(B) class action. *Amchem*, 117 S. Ct. at 2249 n.19.

for insurance funds between [these groups of] claimants." App. 69a-70a, 421a-422a. This overriding "*common*" interest among the two groups was totally lacking in *Amchem*.*

Moreover, as the Fifth Circuit's opinion on remand recognized, this case, unlike *Amchem*, involves a class settlement under Rule 23(b)(1)(B). Although Rule 23(a)(4)'s adequate-representation requirement applies fully in Rule 23(b)(1)(B) cases, the inquiry must be informed by the type of class certification at issue. Rule 23(b)(1)(B) calls for a unitary class resolution in the relatively rare circumstance in which allowing individual class members to maintain "separate actions" seeking full recoveries on their own would "as a practical matter" prejudice *other* class members' claims. Rule 23(b)(1)(B) class actions thus *often* — by definition — involve some degree of tension within the class. Yet they have traditionally been resolved on a *unitary* basis. App. 81a-84a. The reason is that, in the narrow set of circumstances in which the Rule applies, the class's predominant interest — to secure and equitably distribute otherwise potentially unavailable funds — is a *common* one, and any "competition" for those funds is then "controlled" by the court for "the benefit of all members of the class." App. 3a. And *Amchem*, which took pains to note that the case did not involve Rule 23(b)(1)(B), says nothing to the contrary.

II. PETITIONERS' OBJECTIONS TO NON-OPT-OUT CLASS TREATMENT ARE NOT CERTWORTHY.

Citing virtually no cases, much less a conflict among the lower courts, the petition next theorizes that the certification of this class under Rule 23(b)(1)(B) transgresses Rule 23 and a potpourri of statutes. These musings do not merit review.

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* In addition, the Global Settlement also contains *none* of the specific terms found to create a conflict between the two groups in *Amchem*. There is no prohibition on inflation adjustments, which may be fully considered by the Trust; all class members have an *absolute* right to exit to the tort system; no causes of action are extinguished without compensation; and the Global Settlement does not invite tradeoffs between groups of class members by setting different compensation ranges for different groups. *Contrast Amchem*, 117 S. Ct. at 2251.

1. For all petitioners' complaints about the Fifth Circuit's alleged "shoehorn[ing]" of this case into Rule 23(b)(1)(B) (Pet. 17), they *never once* dispute that this case falls squarely within the plain language of that Rule. That language calls for a unitary resolution where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). In other words, in the view of the Advisory Committee (which drafted the Rule), this Court (which endorsed it) and Congress (which passed upon it), individuals cannot opt out of a class where their doing so would substantially prejudice their fellow class members' claims. And that is exactly what the courts below found would have happened here, by creating the serious risks that all of the class would have recovered nothing via the coverage litigation or that much of the class would have recovered nothing under the Trilateral Agreement. App. 77a, 81a, 357-358a. As the Fifth Circuit put it, "[n]o one contests th[is] finding, . . . probably because it is incontestable." App. 2a.*

2. Petitioners' Rules Enabling Act contention consequently faces the presumption that the Rule's plain language does not "transgress[ ] . . . the terms of the Enabling Act." *Hanna* v.

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* Moreover, petitioners' claim that the Fifth Circuit's application of 23(b)(1)(B)'s plain language would render "*every* settlement of class claims for money damages" eligible for class treatment under that Rule (Pet. 19) is based upon a caricature of the opinion below. The Fifth Circuit did *not* certify the class on the basis of a "settlement fund" that is "limited only in the sense that literally *every* settlement is limited." Pet. 19. Rather, it recognized that, absent a unitary resolution, the class's source of recovery would potentially be lost for reasons *unrelated* to the merits of the class's claims: through a potential Fibreboard loss in the coverage litigation. App. 76a-77a. This holding, as the District Court explained, does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). App. 233a.

Plumer, 380 U.S. 460, 471 (1965). Petitioners, however, have offered nothing to overcome this presumption. They offer only the *ipse dixit* — for which they cite only out-of-context snippets of certain questions asked at oral argument in other cases — that class members have a "substantive right" to seek judgments on their individual claims "*in full*," even where their doing so would irretrievably prejudice the rest of the class's claims. They then assert that the Rules Enabling Act forbids the compromise of this supposed "right" through a mandatory class resolution that does not guarantee "full" recovery. Pet. 15-16.

This breathtaking assertion would effectively render non-opt-out class resolutions impermissible in virtually *any* Rule 23(b)(1)-(b)(2) case, contrary to settled law. Absent class members can *always* assert this supposed "substantive right" to "full" recovery: for example, to the most money or the broadest injunction or declaration an individual class member may desire. And these class members can likewise *always* complain that a mandatory class resolution that gets them less than everything they desire (as will happen inevitably in settlement and often in litigation) is an illegitimate forced compromise of this "substantive right" through the rules of procedure.

3. Seeking to mitigate these absurd consequences of their position, petitioners ultimately rest on a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B) or so much as a *single* decided case. Quoting the dissent below, they insist that Rule 23(b)(1)(B)'s plain language cannot be applied here because "the purpose of the suit is to establish . . . rights and not to divide preexisting rights" (Pet. 18): in other words, a unitary resolution would have been permitted had class members' claims sought "equitable relief" in the form of "*in rem* claims" asserting a "preexisting interest" in a "fund" or "specific property," but such a resolution was somehow impermissible here because class members needed a unitary resolution in order to secure a fund to compensate them in the first place. Pet. 15, 17-18.*

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* In an attempt to create the impression that Rule 23(b)(1)(B)'s Advisory Committee Note would limit the Rule's operation in the manner they propose, petitioners selectively quote those Notes as confining

Petitioners, however, never reveal the basis for or significance of this "distinction." In particular, they offer no reason why, if each class member indeed has a "substantive right" to "full" recovery, that right can *ever* be limited in order to avoid prejudice to other class members' claims. This includes the situation petitioners posit: even where a class of plaintiffs has a "preexisting interest" in an insufficiently large "fund," each class member may have an individual claim to a 100-cents-on-the-dollar, disproportionate share of that fund. The petition is resoundingly silent as to why, if these individual rights to seek "full" recovery can be "limited" and "divided" (Pet. 18) to protect the class's overall interest, the same was impermissible here: indeed, class members here were *more* in need of a unitary resolution, since the alternative was not merely a risk of inequitable allocation of a "preexisting fund," but a risk that Fibreboard would have lost the coverage dispute and that *no* fund would have existed at all.

Moreover, far from having any basis in the law when the Rules Enabling Act was enacted in 1938, petitioners' "distinction" is belied by centuries-old settled practice which, as the Fifth Circuit explained, instead embodied the *precise* approach adopted by the plain language of Rule 23: the propriety of a unitary resolution turns on whether "equitable circumstances dictate the need for a unitary adjudication," not on whether the class is asserting "*in rem*" claims to "divide preexisting rights" in a "preexisting" fund. App. 81a-83a.*

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the Rule to "*in rem* claims 'made by numerous persons against a fund insufficient to satisfy all claims.'" Pet. 17. This carefully excises the Notes' statement three sentences later that the Rule is in fact to operate "in the *absence* of a fund either present or potential." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (emphasis added).

* Indeed, as the Fifth Circuit explained, Rule 23(b)(1)(B) is the present-day equivalent of these traditional class actions. App. 81a-82a; *see* Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (specifically referring to *Smith* v. *Swormstedt*, discussed below, as an example of an action falling within the Rule). By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(3).

For example, in *Smith* v. *Swormstedt*, 57 U.S. [16 How.] 288 (1853), this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interests" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be achieved only through a unitary resolution. *Id.* at 302-03. Likewise, unitary resolutions of monetary claims were permitted at common law where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. And it was well recognized that the circumstances permitting a unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them. *See Leigh v. Thomas,* 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good* v. *Blewitt,* 33 Eng. Rep. 343 (Ch. 1807) (same).*

These cases totally belie petitioners' notion that a unitary resolution may be used only to "divide preexisting rights" to a fund, and not to "establish" those "rights" in the first place (Pet. 18): indeed, the object of the class in each of these cases was precisely to "establish" the class's joint rights to the disputed funds. These cases similarly reject petitioners' rigid code-pleading distinctions between "equitable" "*in rem* claims" and "*in personam*" claims. In *Smith*, this Court thus made clear that a court's power to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation." 57

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* Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* (1950), at 285; *see, e.g., Brown* v. *Vermuden,* 22 Eng. Rep. 796 (Ch. 1676); *Brown* v. *Booth,* 21 Eng. Rep. 960 (Ch. 1690); *Chancey* v. *May,* 24 Eng. Rep. 265 (Ch. 1722); and *Adair* v. *New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805).

U.S. at 303 (emphasis added); *cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950) (availability of a unitary resolution "do[es] not depend upon a classification" between "*in rem* and *in personam*" actions). Similarly, at common law, it was "immaterial" to the propriety of a unitary resolution whether "the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *Adair* v. *New River Co.*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (describing the practice as allowing "a person, having at *Law* a general right . . . [to] sue thus in Equity," and as requiring only that enough of the individual class members be brought into court "that it can be said, they will fairly and honestly try the *legal* right between themselves, all other persons interested, and [the party opposing the class]") (emphasis added).

Indeed, many of these cases involved classically *in personam* claims. For example, *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds as a matter of contract interpretation (57 U.S. at 302); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims; *Adair* involved alleged rent overpayments under a contract; and *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S. at 311-14).

In short, petitioners' invented, unsupported effort to engraft an "equitable *in rem*" limitation on Rule 23(b)(1)(B)'s plain language presents neither a division of authority nor any other reason for this Court's review.

4. Finally, as the Fifth Circuit explained in detail, the application of Rule 23(b)(1)(B)'s plain language in this case conflicts neither with the Bankruptcy Code nor with *Keene Corp.* v. *Fiorelli*, 14 F.3d 726 (2d Cir. 1993). App. 74a-79a. As noted above, class members could not have put Fibreboard into bankruptcy without first forcing it to continue and lose the coverage litigation. *See* p. 11, *supra*. Their colorful rhetoric notwithstanding, petitioners never identify exactly what in the Bankruptcy Code required the class to adopt this absurd course, forcing everyone to await "catastrophe" in the coverage litigation (App. 77a) and suspending in the interim the normally available procedures of Rule 23(b)(1)(B). To the contrary, the

Bankruptcy Code expressly permits the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be "better served." 11 U.S.C. § 305(a)(1).*

Keene, by contrast, was different on every level. There, a former asbestos manufacturer tried to evade an immediate and otherwise unavoidable bankruptcy through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it where no settlement existed at all. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and expressly did not decide the propriety of Rule 23(b)(1)(B) certification *(see id.* at 728,730 & n.1, 733); the portion of its opinion relied upon by petitioners is, in the Fifth Circuit's words, a "gratuitous discussion" and does not amount to a conflict warranting this Court's review. App. 75a n.14. (In contrast, on the occasions that the Second Circuit has actually *decided* the issue — including one decision *subsequent* to *Keene* — it has squarely held that Rule 23(b)(1)(B) *may* properly be applied in appropriate cases involving insolvent entities. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).) Even the *Keene* dictum, however, is fully consistent with the decision below. *Keene* involved a situation where, unlike here, class members *could* put the former asbestos manufacturer into bankruptcy immediately. The Fifth Circuit emphasized its agreement that, in those circumstances, "a 23(b)(1)(B) action was not appropriate." App. 76a.

III. THIS CASE DOES NOT PRESENT THE DUE PROCESS ISSUE RAISED IN *ADAMS* AND *TICOR*.

Nor does this case present the question the Court was unable to reach in *Adams v. Robertson*, 117 S. Ct. 1028 (1997), and

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* Petitioners badly distort the Fifth Circuit's opinion in contending that it relied on § 305(a)(1) as "a grant of authority" to "ignore" restrictions on its powers. Pet. 20-21. What the Fifth Circuit actually held was that this section refuted petitioners' claim that, in the circumstances of this case, the Bankruptcy Code divested the court of the *authority it otherwise possessed under Rule 23(b)(1)(B)*. The plain language of § 305(a)(1) shows that the Fifth Circuit was clearly correct in this regard.

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). Those cases each involved the issue whether rules of procedure may constitutionally provide for certification of a mandatory class action that "extinguished [class members'] money damages claims" where there was *no* claim by the parties that affording opt-out rights would have prejudiced those claims. *Ticor*, 511 U.S. at 119; *see Adams*, 117 S. Ct. at 1029 ("preclu[sion]" of fraud claims). Here, by contrast, petitioners do not contest that the plain language of Rule 23(b)(1)(B) calls for a unitary resolution on the facts of this case, or that many class members would be severely prejudiced and potentially recover nothing on their claims if opt-outs were instead permitted. Accordingly, unlike the novel issues in *Adams* and *Ticor*, petitioners' due process claims fly in the face of long-settled precedent, and do not warrant this Court's review.

1. Petitioners first contend that — no matter how draconian the consequences to the class — the courts are constitutionally foreclosed from achieving a unitary resolution whenever the class asserts "*in personam*" claims. Pet. 23. This contention is contrary to the historical precedents, which reject petitioners' formalistic *in rem/in personam* distinction and establish instead that opt-out rights are not required where a unitary resolution is necessary to protect the class. *See* pp. 21-23, *supra*.

Moreover, petitioners' argument is also flatly contrary to the square holding of this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There, this Court considered an identical due process challenge to a unitary resolution of *in personam* money damage claims arising out of alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust. *Id.* at 310-14.* The petitioners there likewise claimed that a unitary resolution violated their due process rights to the extent it encompassed *in personam*, as

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* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement encompassing absent and future parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11. The Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

opposed merely to *in rem*, claims. The Court squarely rejected this contention, holding that "the requirements of [due process] do not depend upon [this] classification. . . . Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." *Id.* at 312-13. Petitioners present no reason why this Court should reexamine this settled law.*

2. Petitioners' fallback position — that this Court should review whether, in a class action such as this one, opt-out rights must be given to class members "who lack minimum contacts with the forum state" — is likewise not certworthy. This contention too is contrary to settled law — as typified by this Court's prior decisions in *Smith* and *Mullane*, both of which explicitly upheld mandatory resolutions binding absent plaintiffs who lacked *any* contact with the forum state. *Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303. Nothing in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), says otherwise. As the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (App. 81a) — that is, the class was certified merely for litigation convenience. The Court's holding requiring opt-out rights in that context therefore did not alter the settled validity, exemplified by *Smith* and *Mullane*, of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution *does* exist. Indeed, the *Shutts* opinion was limited to "those class actions which seek to bind

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* Petitioners' claim of a conflict with *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), is without merit. In that case — which was the lower court decision leading up to *Ticor* — a mandatory class was certified under Rule 23(b)(1)(A) and (b)(2) with respect to a "hybrid" action involving both equitable relief and "*foreclosure* of substantial damage claims" where there were no circumstances requiring unitary resolution of the damage claims. Putting aside whether the underlying certification of a mandatory class in that action was proper under Rule 23, it is plainly distinguishable from this case, where there was an overriding need for a unitary resolution to ensure a source of recovery for the class and in which individual damages will not be adjudicated.

known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3.* Finally, there is no conflict on this point with *In re Real Estate Title*, 869 F.2d 760 (3d Cir. 1989). To the contrary, that case arose out of the same "hybrid" class action that eventually gave rise to *Ticor*, in which there was likewise no need for a unitary resolution; the Third Circuit thus specifically noted that its decision did not "address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief." *Id.* at 768 n.8.

IV. THE NOTICE ISSUE IN *AMCHEM* IS NOT PRESENTED HERE.

Petitioners' one-paragraph notice argument is based entirely on the notion that *Amchem* "recognized" the importance of the notice "issue" in this case. Pet. 25. It did not. Instead, the question this Court "recognized" in *Amchem* regarding notice to a futures class was in the context of a Rule 23(b)(3) case, in which class members needed to make immediate, front-end opt-out decisions. Accordingly, this Court specifically stated that its concern was whether current notice could provide unknown or future claimants with "the information . . . needed to decide, intelligently, whether to *stay in or opt out*." *Amchem*, 117 S. Ct. at 2252 (emphasis added). This concern plainly has no appli-

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* As the Fifth Circuit explained, far from invalidating Rule 23(b)(l)(B)'s plain language, *Shutts* thus recognized the basic distinction made in Rule 23: unitary resolutions are permitted of those actions that fall within the federal courts' authority to fashion "equitable relief" to protect the class — class actions under Rules 23(b)(l)-(b)(2), which are the present day equivalents of the traditional equitable class action. App. 81a-83a & n.16. In addition, *Shutts* is also distinguishable for two further reasons: (1) its holding was expressly limited to class actions involving "known plaintiffs" (472 U.S. at 811-12 n.3), and thus by its terms has no applicability to this futures class action. (2) *Shutts* involved a class action brought in *state* court, and has no bearing on this *federal* class action. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to assert jurisdiction nationwide. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878).

cability to a Rule 23(b)(1)(B) class such as this one in which no opt-out decision is involved. Instead, it is well-settled that — at least where no opt-out decision is involved — in the case of "conjectural or future" claimants the Constitution requires only provision of the best notice "reasonably possible or practicable," because "in the case of persons missing or unknown, employment of an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317.* As the District Court found (App. 452a-456a), and as appellants do not contest, the best notice "reasonably possible or practicable" was clearly provided here.

V. PETITIONERS' CONTRIVED ARTICLE III CLAIMS DO NOT WARRANT REVIEW.

The Article III "issues" raised in the petition are at odds with settled law and do not warrant review. Notwithstanding petitioners' derision of this case as a "feigned proceeding" and a "contrivance among friends" (Pet. 26-27), there can be no dispute that there was a real controversy among the class, Fibreboard and the insurers before the Global Settlement was reached. App. 86a-88a. Instead, petitioners' rhetorical flourishes all boil down to this: they contend that this indisputably real controversy was transformed into an unconstitutional "contrivance among friends" because the terms of a settlement were reached prior to the filing of the complaint, and the action was then "filed to obtain judicial approval of [the] settlement." Pet. 27.

Settled law has dismissed this proposition ever since this Court's decision in *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), rejected an identical Article III objection to a con-

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* Based on this settled law, moreover, the courts routinely decide non-opt-out class action suits involving claims on behalf of unknown, future claimants — such as future schoolchildren, future housing tenants, future employees and future prisoners. *E.g.*, *Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Similarly, as the Fifth Circuit noted, Rule 23(b)(1)(B) class actions "often involve unknown or unavailable claimants" and "bind[ ] future, contingent and unknown claimants." App. 84a.

sent decree that was likewise reached prior to the filing of a complaint and was then presented to the District Court for approval concurrently with the filing of a complaint. *Swift*'s holding has been uniformly applied by the courts of appeals, and such consent decrees (and related settlements such as pre-packaged bankruptcies) have become a regular practice allowing parties to resolve their differences without first instituting often compromise-inhibiting litigation while at the same time not forfeiting potential judicial oversight of issues that may arise.* There is no reason for the Court to revisit this issue.

Nor is there any plausible distinction of *Swift*. Indeed, *Swift*'s holding applies *a fortiori* in this class action context, because Rule 23(e) affirmatively *requires* court approval of class settlements. For this reason, this Court has held that the existence of a class settlement does not end an Article III controversy until approval is received. *Havens Realty v. Coleman*, 455 U.S. 363, 371 n.10 (1982). And the effect of petitioners' argument on class actions would be absurd. In addition to invalidating the practice of consent decrees and pre-packaged bankruptcies, petitioners would institute a regime in which potential class litigants could not even talk prior to litigating, for if such talk led to a settlement before a complaint were filed, Article III would bar them from getting the necessary approval.

Equally without merit is petitioners' alternative argument (Pet. 28-29) that the "exposure only" class members lack injury in fact. This contention centers on the remarkable assertion that persons exposed to asbestos have no justiciable interest in pursuing an action designed to ensure that funds remain available to them when they subsequently contract asbestos-related diseases. For that is what this action does: as the Fifth Circuit put it, this case "does not purport to make any determination of the validity or amount of" exposure-only class members' claims; instead, it "address[es] the immediate and important controversy of whether [they] will be able to receive compensation for their injuries before Fibreboard runs out of money." App. 85a.

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* *See, e.g., SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984), *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *see also* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530, at 320.

Petitioners' notion that Article III prevents exposure-only class members from protecting themselves in this regard until their injuries appear years later — by which point the potential funds to compensate them may no longer exist — is totally at odds with settled law. *Duke Power v. Carolina Environmental Study*, 438 U.S. 59, 72-74 (1978); *In the Matter of UNR Industries*, 20 F.3d 766, 769 (7th Cir.); *In re Agent Orange*, 996 F.2d 1425, 1433-38 (2d Cir. 1993). And petitioners' refrain that these class members potentially could not as of this moment recover money damages under state law is beside the point: they brought this action not to recover damages now, but to ensure the availability of funds when they do develop indisputably compensable injuries. They unquestionably have standing to do so. *See, e.g., UNR Industries*, 20 F.3d at 770.*

Finally, petitioners' argument that future claimants lack standing to protect rights they will develop in the future is impossibly overbroad. A partial list of the settled practices it would invalidate includes: the payment and discharge of future claims in bankruptcy (*e.g., UNR Industries*, 20 F.3d at 770-71); actions brought on behalf of unborn heirs or those with future or contingent interests, such as those regarding trusts (*e.g., Mullane*, 339 U.S. at 316-17); actions to impose equitable receiverships or constructive trusts for the benefit of future victims (*e.g., In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992); and class actions on behalf of future prisoners, future schoolchildren or future housing tenants (*see* p. 28n.*, *supra*). The decision below thus (again) rests on settled law, and there is no warrant for further review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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* Moreover, petitioners' cite no authority for their claim that exposure-only asbestos plaintiffs cannot recover money damages immediately. To the contrary, exposure-only claims *are* permitted in many states — including California, where Fibreboard is subject to personal jurisdiction. App. 252a; *Potter v. Firestone*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. App. 1993).

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